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No. 92-1748

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ESTATE OF JOHN L. BOHN, *et al.*,
Petitioners,
v.
PAUL WADDELL, *et al.*,
Respondents.

ARTHUR J. ABBOTT, *et al.*,
Petitioners,
v.
PAUL WADDELL, *et al.*,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of Arizona, Division One

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The petitioners respectfully submit this Reply Brief in response to the Brief in Opposition filed by Respondents.

I. THE ARIZONA COURT OF APPEALS' DENIAL OF A CLEAR AND CERTAIN REMEDY RAISES A SUBSTANTIAL FEDERAL QUESTION.

By virtue of the unprecedented decision below, the petitioners have been relegated to an illusory remedial scheme under which the final decision is not subject to review by this Court. Indeed, the final decision is not

subject to review in any court. Instead, under an uncertain political process, the legislature and governor of Arizona will decide whether a remedy will be provided for a violation of rights secured under the laws and Constitution of the United States. (Pet. at 18-19; 157a). The deficiencies in the New Jersey state tax scheme, which the Court held to be inadequate in *Hillsborough v. Cromwell*, 326 U.S. 620 (1946), pale in comparison to what respondents urge here as adequate to satisfy the requirements of the Constitution. In analogous contexts, this Court has repeatedly recognized the importance of the federal question presented by this petition:

> 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery . . . .'

Cooper v. Aaron, 358 U.S. 1, 18 (1958) (quoting *United States v. Peters*, 5 Cranch 115, 136 (1809)).

Respondents attempt to avoid the important due process issue raised by this petition by misdescribing state law extant at the time the Arizona Court of Appeals announced its decision.[1] The respondents also misrepresent the resulting new illusory remedial scheme and claim that the new scheme is "sixty years old". These assertions are false. (Resp. Br. 7). *See McKesson Corp. v. Florida Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 49 n.34 (1990) ("We need not consider the import of this contention, because respondents misdescribe state law.").

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[1] The respondents' opposition is rife with assertions, distortions, and inaccuracies not supported by the record. For example, the respondents assert that Arizona's statute was "unchallenged . . . before *Davis*." (Resp. Br. 2). In fact, not only was the statute the subject of longstanding challenge before this Court's decision in *Davis* (R. 121, 125, 239), the unjustified discrimination was recognized by the legislature "many years" before *Davis* and left unremedied. (R. 111L).

No Arizona administrative agency has the power to determine that a statute is unconstitutional. *See, e.g., Arizona Corp. Comm'n v. Tucson Gas, Elec. Light & Power Co.*, 67 Ariz. 12, 189 P.2d 907, 908 (1948) ("The Corporation Commission apparently knew it had no right to consider the constitutionality of [the statute], it being its duty to assume that the law was constitutional."); *Trico Elec. Co-op. v. Ralston*, 67 Ariz. 358, 196 P.2d 470, 473 (1948) ("No judicial power is vested in or can be exercised by [a] . . . commission unless that power is expressly granted by the constitution."); *Manning v. Reilly*, 2 Ariz. App. 310, 408 P.2d 414, 416 (Ct. App. 1965) ("Legal or constitutional questions concerning the validity of a[n] . . . ordinance require judicial determination and are beyond the scope of an administrative body's powers and authority."). The exclusive remedy available to the petitioners at the commencement of this suit was an action for declaratory relief and refunds. *See, e.g., O'Neil v. Valley Nat'l Bank*, 58 Ariz. 539, 121 P.2d 646 (1942) (direct action for declaratory judgment invalidating an Arizona tax imposed in violation of the intergovernmental tax immunity doctrine in the wake of this Court's decision in *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941));[2] *State v. Levy's*, 119 Ariz. 191, 580 P.2d 329 (1978) (direct action for declaratory judgment invalidating an Arizona tax scheme which violated the Arizona constitution). Indeed, the respondents' notice to the members of the petitioner class recognizes that the petitioners invoked the proper remedy under Arizona law. (Pet. 166a).

The respondents should be embarrassed to recall that almost 40 years ago the Arizona legislature brought the statutory refund scheme into compliance with the Arizona common law and Art. VI, § 14(2) of the Arizona Constitution (Pet. at 155a) by repealing any mandatory ex-

[2] *See also State Compensation Fund v. Symington*, 848 P.2d 273 (Ariz. 1993) (citing *O'Neil, supra*, with approval).

haustion requirement.[3] Indeed, contrary to the respondents' assertion, one of the few constants in Arizona law since its statehood has been the judicial remedy secured by the Arizona Constitution which the petitioners invoked in this case.[4] Significantly, in successfully moving to have this case transferred within the Maricopa County Court system, the respondents asserted:

> A.R.S. § 12-161 *et seq.* provides that the Maricopa County Superior Court exercise the *original jurisdiction* of the superior court over cases which involve the *legality of taxes* by assigning tax cases to a tax department. The tax department of the Court is the Arizona Tax Court. . . . Title 12 . . . sets forth procedures by which the superior court should handle tax matters to better carry out the *jurisdiction conferred by the Arizona Constitution.*

(R. 45) (emphasis added).

The respondents' attempt to disavow the settled remedy, which has been denied to the petitioners in this case, is disingenuous. However, it is easily explained. Shortly after the commencement of this case, the Arizona Supreme Court ruled that the Arizona refund right is not subject to the prospectivity defense. *See Pittsburgh & Midway Coal Mining Co. v. Arizona Dep't of Revenue*, 161 Ariz. 135, 776 P.2d 1061, 1065 (1989) (rejecting the notion that the refund right may be qualified by the

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[3] Prior to its *repeal* by the Income Tax Act of 1954, Ch. 65, 1954 Ariz. Ses. Laws 80, the Arizona statute had provided that "[a]n action . . . for the refund or recovery of income taxes alleged to have been erroneously collected or paid, shall be brought as provided in this section and not otherwise." A.C.A. § 73-1544 (1939, repealed).

[4] In contrast, the statutory provisions governing tax administration have been the subject of frequent change. For example, in 1978, the statutory scheme was dramatically amended. Laws 1978, Ch. 213. The part-time Board of Tax Appeals ("BOTA") was created to replace the Arizona Tax Commission. *See also* note 3, *supra*.

"clarity of the law at the time of payment").[5] Nevertheless, that provides no justification for the denial of the remedy here.

Absent review by this Court, the petitioners will be denied "the only remedy ever available for the enforcement of [their] right," *Brinkerhoff—Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 679 (1930), to recover the taxes unlawfully exacted. The intervening mischief of the Arizona legislature, which forecloses a clear and certain remedy for all unconstitutional taxation in Arizona, underscores the significance of the federal question presented by this Petition. (Pet. at 18-19). Moreover, in view of this Court's recent decision in *United States v. California*, —— U.S. ——, 113 S. Ct. 1784 (1993), the decision below, if permitted to stand, will adversely affect the rights of the United States to enforce its interests in the State of Arizona.[6]

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

The decision below, as well as the respondents' efforts to rewrite the record, cannot withstand scrutiny. It is

[5] Of course, even in the absence of the *Pittsburgh* decision and this Court's plurality decision in *James B. Beam Distilling Co. v. Georgia, et al.*, —— U.S. ——, 111 S. Ct. 2439 (1991), Arizona faced insurmountable problems in asserting a prospectivity defense. Arizona has long recognized that federal pensions are deferred compensation for personal service rendered. *See* Op. Ariz. Att'y Gen. No. 60-9-L (1959). Similarly, like several other *Davis*-related states, the legislature, while recognizing the discrimination, refused the pre-*Davis* efforts of citizens to cure its violation of 4 U.S.C. § 111. (R. 111L, 125, 239). Finally, Arizona clearly has the resources to fund its refund obligation. For example, during the pendency of this case, the State has chosen to overfund its state retirement plan to the extent of 1.2 Billion Dollars, while refusing to provide the petitioners a remedy. (R. 112).

[6] Indeed, the interests of the United States' current employees are already at risk because of Arizona's steadfast refusal to comply with 4 U.S.C. § 111 even as to post-*Davis* tax years. *See* Pet. at 9 n.9.

axiomatic that, as a precondition to obtaining refund relief for taxes exacted in violation of 4 U.S.C. § 111, the petitioners first had to obtain a declaration that the Arizona statute imposing the tax was invalid or unconstitutional. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 106-07 (1981). *Cf. Quill Corp. v. North Dakota*, —— U.S. ——, 112 S. Ct. 1904, 1922 (1992) (White, J., dissenting) ("[W]e should insist that the appropriate way to challenge a tax as unconstitutional is to pay it . . . and then sue for declaratory judgment and refund."). However, at the time this case was commenced, no administrative agency had the power to grant the declaratory relief sought. *See Chase Dist. v. Arizona Dep't of Revenue*, [1956-1989 Transfer Binder—New Matters] Ariz. Tax Rep. ¶ 200-824 (CCH) (Ariz. Bd. of Tax App., June 7, 1988). *See also* Pet. at 13 n.15.[7] Settled Arizona law prohibited and continues to prohibit an administrative agency from indirectly providing the relief that is sought by the petitioners. *See Tucson Transit Authority, Inc. v. Nelson*, 107 Ariz. 246, 485 P.2d 816, 822 (1971) ("A tax exemption cannot be implied. . . .").

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[7] Respondents' reliance on *Valley Vendors Corp. v. City of Phoenix*, 126 Ariz. 491, 616 P.2d 951 (Ct. App. 1980) as authority to support its contention that Arizona administrative agencies have the power to determine the validity of statutes is baseless. (Resp. Br. 9). *Valley Vendors* did not involve a challenge to the validity of the Phoenix tax law. The only challenge was to the improper administration of the law. (Pet. at 167a-168a). Also, *Valley Vendors* did not involve the administrative process of the Arizona Department of Revenue or BOTA. Nor did it implicate the remedy provided to these petitioners under Ariz. Const. Art. VI, § 14(2). (Pet. at 155a). Similarly, none of the other administrative cases cited by the respondents stand for the proposition cited. (Resp. Br. 13-14 n.10). For example, *Robinson's Hardware v. Arizona Department of Revenue*, [1956-1989 Transfer Binder New Matters] Ariz. Tax Rep. ¶ 220-551 (CCH) (Ariz. Bd. of Tax App., Sep. 30, 1982) did not involve any constitutional decision. BOTA simply concluded that certain "sales . . . are exempt from . . . tax under A.R.S. § 42-1321(A)(4)." *Id.*

Just last term this Court had occasion to reaffirm its settled jurisprudence regarding the exhaustion of administrative remedies in *McCarthy v. Madigan*, —— U.S. ——, 112 S. Ct. 1081 (1992). The decision below and the respondents' contentions here cannot be reconciled with *McCarthy* or any of this Court's precedents reaffirmed therein.

It is undisputed that under the Arizona Court of Appeals' new remedial scheme there are no time limits as to when the Department of Revenue or BOTA must act. (Pet. at 15-16). It is also undisputed that there are no rules governing how the petitioners are to prosecute or how the respondents procedurally would dispose of the petitioners' claims. (Pet. at 163a).[8] It is also undisputed that there is no record for a reviewing court to consider. (Pet. at 19 n.23). Similarly, even in the absence of an intention to delay, it is also undisputed that BOTA, as a part-time agency, lacks the resources to process petitioners' claims. Indeed, BOTA's own records establish that it would take *centuries*, not years, to exhaust the blackhole of uncertainty to which the Arizona Court of Appeals has relegated the petitioners. (Pet. at 16; 170a).[9]

The respondents' assertion that there are no due process concerns (Resp. Br. 11-12) is unsupported by the rec-

[8] Even if respondents' position otherwise had merit, under Arizona law this deficiency alone excuses exhaustion. *See Burnkrant v. Saggau*, 12 Ariz. App. 310, 470 P.2d 115, 117 (Ct. App. 1970) ("But this rule presupposes an adequate and clearly *ascertainable* administrative remedy. Manifestly there can be no such remedy in a system which rests in parol.") (emphasis in the original).

[9] Against all of this, the respondents urge the Fifth Circuit's now-reversed decision in *Coit Indep. Joint Venture v. Firstsouth*, 829 F.2d 563 (5th Cir. 1987), for a proposition expressly overruled by this Court in *Coit Indep. Joint Venture v. FSLIC*, 489 U.S. 561 (1989). (Resp. Brf. 11). Contrary to the respondents' assertion, because there are no time limits whatsoever under Arizona's new remedial scheme, petitioners "cannot be required to exhaust those procedures." *Id.* at 587.

ord. The respondents, even before the commencement of this case, "predetermined" the merits of petitioners' claims. *See McCarthy*, 112 S. Ct. at 1088. From then and until now, the respondents and their counsel have steadfastly maintained that the petitioners' "claim[s] of nontaxability . . . [are] denied." *See City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 27 (1934). R. 50, 126. Any resort to the respondents would have been "utterly futile." *Montana Nat'l Bank of Billings* v. *Yellowstone County*, 276 U.S. 499, 505 (1928). Thus, exhaustion here is excused.

Similarly, the respondents' suggestion that the constitutional deficiencies in the Arizona Court of Appeals' new remedial scheme are cured by a predeprivation remedy is baseless. There is no such remedy. The record establishes that the respondents have compelled payment of this tax. R. 39, 273. (Pet. at 10 n.11). Indeed, they have even seized federal retirees' property. *See Porter v. Waddell*, TX89-01150 (Ariz. Tax Court). In addition, the courts below have denied all predeprivation relief (Pet. at 2a) while the petitioners were forced to comply with a "coercive" tax scheme. *Duhame v. State Tax Comm'n*, 65 Ariz. 268, 179 P.2d 252 (1947).

Finally, the respondents purport to circumvent the constitutional deficiencies of A.R.S. § 35-196.03 (Pet. at 19; 157a) by representing to this Court that this uncertain remedy only applies to courts, not to the respondents. (Resp. Br. 13). The illogic of this breathtaking assertion needs no response because, in making it, the respondents mislead this Court. Contrary to their brief, the respondents' publicly announced position is that because of this statute the "agency legally can't make refunds unless the legislature appropriates the funds." The Business Journal (Phoenix), *Retirees finding a link between death and taxes*, October 19, 1992 at 7.

As this Court has observed:

> [O]ur government 'has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.'

Franklin v. Gwinnett County Public Schools, —— U.S. ——, 112 S. Ct. 1028, 1033 (1992) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). Here, this fundamental principle will be violated absent a grant of the petition. Unless this Court resolves that its mandate of "'a clear and certain remedy,'" *McKesson Corp. v. Florida Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 32 (1990) (citation omitted), applies with equal force to all unconstitutional exactions, Arizona and other states will continue to "render inutile" rights conferred by Congress and the Constitution. *See Franklin v. Gwinnett County Public Schools*, 112 S. Ct. at 1029.[10]

III. THE COURT OF APPEALS' DECISION DISCRIMINATES BASED ON THE ORIGIN OF THE PETITIONERS' CLAIMS.

The respondents' attempt to distinguish *State Compensation Fund v. Symington*, 848 P.2d 273 (Ariz. 1993) (Resp. Br. 16) is unavailing. The settled decisional law establishes that taxpayers seeking relief from taxes based on state constitutional grounds are assured the clear and certain judicial remedy in the Superior Court, which has been denied to petitioners in this case. *State v. Levy's*, 119 Ariz. 191, 580 P.2d 329 (1978). In addition, the issue of discrimination against the petitioners based on the origin of their claims was properly raised and preserved below. *See* Appellants' Reply and Answering Brief, 35.

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[10] *See* Pet. at 11-12.

CONCLUSION

For the reasons set forth above and in the Petition for Certiorari, petitioners request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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